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NO. 225.

IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,

*Plaintiff in Error,*

vs.

JOHN M. McDONALD.

*Defendants in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF MONTANA.

BRIEF FOR PLAINTIFF IN ERROR.

PRESTON H. LESLIE,

*United States Attorney for the District of Montana,*

*Attorney for the Government.*



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STATEMENT OF FACTS.

This action was commenced by the petitioner on the 13th day of June, 1893, asking judgment against the United States for \$2,737.50, alleged to be due and owing to him for clerical services rendered to the United States Attorney for

the District of Montana commencing March 12th, 1891, and continuing to December 31st, 1891, amounting to \$1,237.50; and the other item is for like services as clerk in said office for the year 1892, \$1,500.00.

It is alleged that he rendered the services under appointment by the United States District Attorney, at an annual salary of \$1,500, pursuant to authority from the Attorney General of the United States.

The answer admits the appointment by the District Attorney, and the services charged and the price charged, so far as pertains to the first item, to-wit: from March 12th to December 31st, 1891, but denies the item for clerical services for the year 1892.

Upon the trial the court gave judgment for the defendant in error, against the United States, for the first item of his claim \$1,237.50, and adjudged against him as to the other item of \$1,500.

A bill of exceptions was duly signed and allowed by the court (record p. 26), and the United States sued out this writ of error (Record p. 47).

### ASSIGNMENTS OF ERROR.

The defendant, before suing out a writ of error in this case, filed the following assignment of errors, committed by the court in the rendition of the judgment herein, viz:

#### I.

The court erred in finding as a fact that from the 12th

day of March, 1891, to the 31st day of December, 1891, the plaintiff performed services for the United States as Clerk in the office of the United States District Attorney for the District of Montana.

That he was employed to perform said services for the United States by E. D. Weed, the United States District Attorney for the District of Montana, and his salary was fixed at \$1,500 per annum.

That said Weed was duly authorized to so employ plaintiff at said salary.

. II.

The court erred in finding as a conclusion of law that the plaintiff was entitled to a judgment against the United States for the sum of twelve hundred and thirty-seven dollars and fifty cents (\$1,237.50).

III.

The court erred in giving the plaintiff judgment for the sum of \$1,237.50 against the defendant, the United States.

Wherefor defendant prays that the judgment rendered in this case may be reversed for the reasons hereinbefore set forth.

ARGUMENT.

The judgment in this case is on account of services rendered by the plaintiff as Clerk in the office of the United States District Attorney for the District of Montana, from the 12th

day of March, 1891, to the 31st day of December of the same year.

We insist that the services of a clerk in the office of the United States District Attorney are payable from the fees and emoluments of his office, and not payable otherwise by the United States.

See section 835 of the Revised Statutes of the United States, which reads as follows:

“SEC. 835. No District Attorney shall be allowed by the Attorney General to retain of the fees and emoluments of his office which he is required to include in his semi-annual return, for his personal compensation, over and above the necessary expenses of his office, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the Treasury Department, a sum exceeding six thousand dollars a year, or exceeding that rate for any time less than a year.”

No other provision or appropriation of money was ever made by Congress for the payment of such services, and the uniform holdings of the Departments and accounting officers with regard to that class of service as applied to the clerical force and deputies in the Marshal's and Clerk's offices of the courts, and to the District Attorney's, have been that way. The clerk in the office of a District Attorney is not a Government officer. His position as such clerk does not entitle him to either salary or fees from the Government. He is not in the employment of the Government, or acting as its agent. The provisions for compensation and terms upon which he is

to be paid are exclusively matters of contract between himself and the District Attorney for whom he does the work. The Government allows to the District Attorney his clerk hire as part of the expenses of his office to be paid only out of the emoluments of his office, in excess of the maximum to which he is entitled by law.

See U. S. vs. McLean, 95 U. S. Rep., 751.

Powell vs. U. S., 60 Fed., 687.

Bollin vs. Blythe, 46 Fed., 181.

Wallace vs. Douglas, 103 N. C., 19.

U. S. vs. Meigs, 95 U. S., 748.

Second:—In order that a District Attorney may have the help of a clerk in his office, and whose pay can come from the emoluments of his office, the rules of the Department of Justice require that he shall first get permission from the Attorney General for such help.

There is not one instance on record where the Attorney General ever did employ or give authority for the employment of a clerk in the office of a District Attorney at the charge of the Government, except as provided in the statute, section 835 aforesaid. And in the case now under consideration it appears that the District Attorney applied to the Attorney General for an Assistant to himself in his office, suggesting the manner and fund from which he should be paid; but the Attorney General refused to comply with his request, and instead offered him the privilege of employing a clerk who could serve him in that capacity and also assist him otherwise, and fixed the compensation at \$1,500 per annum;

but expressly provided that the pay for such clerk and other assistance he might render should be paid as is provided in section 835 of the Revised Statutes, and not otherwise by the Government.

(See letter of the Attorney General in the record, pages 33 and 34.)

Under the authority of this letter, the District Attorney employed the plaintiff to work for him, and not for the Government; and afterwards he undertook to get credit to himself in his accounts with the Government for this part of the expenses of his office. But the same was suspended because not presented in the proper manner, and is yet pending before the Department, awaiting correction in form before payment.

(See letter of Comptroller to District Attorney on the subject of this item, and the words of the District Attorney therein, pages 42-3 of the record.)

We think the plaintiff has failed to show any cause of action against the Government, and respectfully ask that the decision of the court below be reversed.

PRESTON H. LESLIE,

*United States Attorney for the District of Montana,*

*Attorney for the Government.*